

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

In the Matter of
AMERICAN MARINE PRODUCTS COMPANY, a corporation,
Debtor.

GLOBE GRAIN AND MILLING COMPANY, INDUSTRIAL OIL
PRODUCTS CORPORATION, AND MURRAY OIL PRODUCTS
COMPANY,
Appellants,

vs.

AMERICAN MARINE PRODUCTS COMPANY, a corporation,
Appellee.

APPELLANTS' OPENING BRIEF

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No. 8505.

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Statement of Pleading and Jurisdictional Facts.

1. The American Marine Products Company, a corporation, debtor, filed its petition for reorganization under Section 77-B of the National Bankruptcy Act.

2. The appellants petitioned the Court for permission to intervene by virtue of the provisions of Section 77-B, subdivision c. paragraph 11 [11 U. S. C. A. § 207, c.

(11)], which reads as follows: "Any creditor * * * shall have the right to be heard on the question of the permanent appointment of any trustee or trustees, and on the proposed confirmation of any reorganization plan, and upon filing a petition for leave to intervene, on such other questions arising in the proceedings as the judge shall determine." The said petition to intervene was also submitted to the Court under the practice in equity to litigate all matters and prevent a multiplicity of suits, in the event the appellants were held to be not creditors, and further under Equity Rule Number 38. The petition of the appellants [Record 27] alleges [Record 29] that the debtor has 45,000 gallons of oil and a large quantity of meal, and that appellants have an interest therein, and that the debtor, with the approval of the Court, threatens to dispose of said merchandise to the detriment of the appellants. The questions involved are these: the appellee, debtor, entered into certain contracts to deliver merchandise to the appellants, some of which merchandise was deliverable subject to production [Record 35, 37, 39 and 44] and other merchandise was deliverable not subject to production [Record 42]. The debtor produced some merchandise but repudiated its contracts with appellants and claims the latter have no interest in the merchandise on hand or in that proposed to be produced. The debtor further denies, in answer to appellants' petition, that the appellants are creditors [Record 49].

Statement of the Case.

On December 31, 1936, debtor filed its petition for reorganization under said Section 77-B. On the same day, the Court made its order authorizing the debtor to continue in possession of its business, etc. [Record 14]. Other litigants were permitted to intervene on January 18, 1937 [Record 19]. On February 1, 1937, appellants herein filed their petitions to intervene [Record 21]. On February 4th, thereafter, the Court took the matter under submission upon the petitions, and denied the appellants the right to intervene and allowed an exception [Record 23].

Assignment of Error.

All assignments of error enumerated on page 55 of the Record will be consolidated for the purpose of argument, because, though severally stated, they constitute a single error.

The Trial Court Erred:

1. In effect holding that appellants and petitioners were not sufficiently interested in said proceedings to be allowed to intervene under Section 77-B, subdivision (c) of the Bankruptcy Act.

2. In effect holding that the appellants and petitioners were not interested in said proceedings to be allowed to intervene under Section 77-B, subdivision (c) of the Bankruptcy Act.

3. In effect holding that appellants and petitioners did not come within the purview of Section 77-B of the Bankruptcy Act.

The controversies which the court below should determine are:

(a) Whether or not the appellants, or any of them, have any interest in the oil or meal now on hand;

(b) Whether appellants, or any of them, will have any right or interest in any further products of the debtor; and

(c) Whether the appellants, or any of them, are creditors of appellee, the debtor.

Such questions present controversial matters which are proper subjects for intervention.

ARGUMENT.

Appellants herein claim rights which are not entirely litigable under that portion of Section 77-B, subdivision c (11) relating to powers of creditors who are not before the Court on petition in intervention. The controversy herein existing is remote to the matter of the permanent appointment of a trustee, and under this section. any other subject of controversy, with the exception of "the proposed confirmation of any reorganization plan," may be presented, heard and determined only after intervening in the proceedings. The ruling appealed from leaves these appellants without an opportunity to have

their respective rights determined. In the present state of the proceedings before the trial court, the debtor, with the approval of the Court, may, on *ex parte* order, sell merchandise in which appellants claim an interest. It will plainly be seen from Exhibit "D" [Record 42], that the debtor agreed to deliver oil, subject to production, and appellants allege that there was, at the time the petition was filed, 45,000 gallons of such oil [Record 29] in the possession of the debtor. This allegation was not denied by the debtor in his answer [Record 48-9], the result of which is to leave a subject matter and controversy to which the Court below should give just consideration at the time debtor attempts to make disposition of its products aforementioned. It will therefore be impossible for the appellants to present their respective contentions without notice of the filing of petitions by debtor and proposed issuance of orders respecting their rights. Should such orders for such disposition of said merchandise be made adverse to appellants, they could not take appeal on any such questions decided unless they had filed their petition for intervention. Under the section above-mentioned, they could not even be heard "on such other questions in the proceedings as the judge shall determine."

Harkins v. Milwaukee & Sawyer Bldg. Corporation, 79 Fed. (2d) 478 (1935),

which decision contains language as follows: "Petitioner filed no intervening petition in the proceeding below, hence, was a party to them only for the purposes enumerated in the statute. It follows that she was not entitled

to pray an appeal to this Court nor to other relief sought in her petition.”

It will plainly be seen that no opportunity will be afforded appellants to be heard on the questions they present, unless they first come into Court in the manner provided by statute.

Appellants have been denied their day in court, as the lower court has closed all avenues by which appellants could obtain redress for the wrongs they assert have been or may be done. The lower court closed to the appellants any tribunals by enjoining and restraining appellants from instituting or prosecuting any action at law or proceeding in equity against the debtor in any court of law or equity or bankruptcy, or at all [Record 17].

It is therefore most earnestly urged by counsel for appellants, that in the light of the authorities quoted and cited, and the manifest error of the lower court, this Court should reverse the order heretofore made in the premises by the lower court, and give the appellants the benefit of a hearing upon the real merits of their respective issues.

Respectfully submitted,

HIBBARD AND KLEINDIENST,

By: LOUIS KLEINDEINST,

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